

Arizona Capital Representation Project  
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## IN THE SUPREME COURT OF ARIZONA

In the Matter of: Petition to	)	Supreme Court No. R-08-0041
Amend Rule 6.3, Arizona Rules	)	
Of Criminal Procedure.	)	Comment to Capital Case Oversight
	)	Committee Proposed Amended Rule of
	)	Criminal Procedure 6.3

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The Arizona Capital Representation Project (“Project”) is a nonprofit death penalty resource center committed to improving representation of death-sentenced inmates and defendants facing a possible death sentence in the State of Arizona. Since 1989, the Project has directly represented dozens of capital prisoners, assisted in the cases of hundreds of other capital prisoners, drafted voluminous written materials regarding capital case issues and provided numerous training seminars to capital defense attorneys throughout Arizona. As a result of this extensive work, the Project is thoroughly familiar with the standards for constitutional and fair proceedings in capital cases. The Project hereby provides the following comment regarding the Capital Case Oversight Committee’s proposed changes to Arizona Rule of Criminal Procedure 6.3.

The Project supports the proposed rule amendment with two suggested modifications for the reasons explained below.

**1. The Proposed Amendment is Aligned with Counsel’s Existing Duties Under the ABA Guidelines and Rule 6.8**

As indicated in the Petition to Amend Rule 6.3, the Proposed Amendment brings Arizona Criminal Rule 6 more in line with the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003) and Arizona Rule 6.8(b)(1)(iii). Petition at 2-3 (discussing ABA Guideline 10.13, *Duty to Facilitate the Work of Successor Counsel*). The ABA Guidelines are the “well defined norms” as recognized by the U.S. Supreme Court and this Court. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003).

Although counsel in Arizona have long had a duty to preserve their client’s file and relinquish it upon request, the difficulty of record collection remains an unfortunate reality for appellate counsel at all stages of capital litigation.<sup>1</sup> 17 A.R.S. Supreme Court Rules, Rule 42, Arizona Rule of Professional Conduct, E.R. 1.16(d)(requiring that upon termination of representation, an attorney provide the client “with all the client’s documents, and all the documents reflecting work performed for the client.”); *In the Matter of Struthers*, 179 Ariz. 216, 224-25, 877 P.2d 789, 797-98 (1994)(attorney ultimately disbarred, found to have violated E.R. 1.16(d) by refusing to turn over client’s file after termination of representation); *In the Matter of Giles*, 178 Ariz. 146, 149, 871 P.2d 693, 696 (1994)(attorney suspended for, *inter alia*, failing to turn over the client’s file upon request). What is more, prior counsel have at times

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<sup>1</sup> For example, in *Rienhardt v. Schriro*, CV-03-290-TUC-DCB, habeas counsel were forced to move the District Court for its order requiring declarations from counsel regarding the status of relinquishment of Mr. Rienhardt’s file. Motion for Order Requiring Declarations from Counsel (7/8/03); *Rienhardt v. Schriro*, Order (7/10/03)(granting Motion for Declarations from Counsel; ordering prior counsel to file *ex parte* declarations regarding the status of the case file and immediately disclose to habeas counsel any remaining portions of the file).

taken the position that work product must be removed from the file before possession is relinquished. Rule 1.16(d), Comment (“[o]rdinarily, the documents to which the client is entitled, at the close of the representation, include [without limitation] pleadings, legal documents, evidence, discovery, legal research, work product, transcripts, correspondence, drafts, and notes...”). These practices are unprofessional and unacceptable.

The Proposed Rule codifies counsel’s professional and ethical duties. Significantly, the Proposed Amendment also explicitly requires the relinquishment of work product. Comment to Proposed Amendment 6.3 (“The entirety of the attorney’s files, including, but not limited to notes, electronic files and correspondence, investigator produced product and mitigation specialist produced product, shall be included.”) The Proposed Amendment accurately reflects Arizona law and the national professional standard of care.

## **2. The Proposed Amendment Should Impose an Obligation on Successor Counsel to Collect the Entire File**

In its consulting capacity, the Project has become aware of a widespread habit of Arizona direct appeal counsel of obtaining only the transcripts and record on appeal of their client’s proceedings from trial counsel. As a fundamental matter, this practice ignores direct appeal counsel’s duty to review the entire record. ABA Guideline 10.15.1, *Duties of Post-Conviction Counsel*, Commentary, p. 126 (“Practice varies among jurisdictions as to the limits of the appellate process and the relationship between direct appeals and collateral post-conviction challenges to a conviction or sentence. Issues that are only partially or minimally reflected by the record, or that are outside the record, should be explored by appellate counsel as a predicate for informed decision making about legal strategy.”) This duty has

constitutional implications given a defendant's Sixth Amendment right to counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387 (1985)(holding a criminal defendant is entitled to effective assistance of counsel on first appeal as of right). Similarly, it is not uncommon for habeas counsel to obtain portions of their client's file from trial and direct appeal counsel although this material should have long before been requested by state postconviction counsel. Aside from constitutional, professional, and ethical concerns, this practice creates the practical problem of a scattered file which hinders file collection at later stages.

The Proposed Amendment goes far to delineate the duties of prior counsel, but fails to explicitly require successor counsel collect the entire file. Proposed Amended Rule 6.3(d), Comment ("A file should be properly maintained during the representation and properly stored so it can be expeditiously provided to successor counsel."). The Proposed Amendment and Comment assume successor counsel will expeditiously *request* the entire file, however, as explained *supra*, that is not uniformly the case. This Court should adopt a concomitant requirement that successor counsel expeditiously collect and maintain the client's entire file. *See* Appendix, §6.3(e).

### **3. The Proposed Amendment Should Require Counsel to Provide Successor Counsel with the Original File**

The Proposed Amendment suggests that a copy of the capital client's file is sufficient to provide to successor counsel. Proposed Amended Rule 6.3(d)("Each counsel representing a capital defendant shall make every effort to ensure that successor counsel is provided with a complete copy of the records and file..."). The most prudent interpretation of the ethical rules, however, mandate a client be provided with his or her original file. Rule

1.16(d), Comment (discussed *supra*); Ethical Opinion 92-01 (1992) <http://www.myazbar.org/ethics/pdf/92-01.pdf> (discussing ER 1.15 & 1.16; “...the inquiring attorney must forward to his client all *original documents* the client is entitled to receive. The client is entitled to receive all documents in the file unless the inquiring attorney has a legal basis for retaining the documents.”)(emphasis supplied); Ethical Opinion 93-03 (1993) <http://www.myazbar.org/ethics/pdf/93-03.pdf> (discussing ER 1.15 & 1.16; finding it is appropriate to charge a client for duplication of the file only after the client has received all documents to which he or she is entitled). The process of reproduction often omits critical aspects of the file, such as double-sided copies, hand-written notes on the back of papers, file folders, or “sticky-notes.” Reproduction also runs the risk of distorting prior counsel’s original file organization—a critical factor in litigating claims such as ineffective assistance of counsel or *Brady* violations. ABA Guideline 10.13(A)(“...members of the defense team have a continuing duty to safeguard the interests of the client and should cooperate fully with successor counsel...includ[ing]...maintaining records of the case in a manner that will inform successor counsel of all significant developments relevant to the litigation;”); see also David M. Siegel, *The Role of Trial Counsel in Ineffective Assistance of Counsel Claims: Three Questions to Keep in Mind*, THE CHAMPION, Feb. 2009, §III (“Have you prepared and preserved the file, and provided it to successor counsel (or the former client) in a way that enables meaningful evaluation of an IAC claim?”). Given the client’s proprietary right to the file, the better policy is to permit prior counsel to maintain a copy of the file, if he or she so chooses, and to provide the original file to successor counsel, who is actively representing the client.

This Court should modify the language of the proposed comment to read: “Each counsel representing a capital defendant shall make every effort to ensure that successor counsel is provided with...[the complete, original file and records] consistent with the ABA Guidelines...”. This change would much more accurately reflect counsel’s ethical obligations and adequately protect capital defendants. *See* Appendix §6.3(d), Comment.

In sum, the Project views the Proposed Amendment as largely beneficial, though strongly recommends the above changes. We thank you for the opportunity to comment on this proposal. Please contact us should you have any further questions.

Respectfully submitted this 20<sup>th</sup> day of May, 2009.

s/ Amy Armstrong  
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A copy of this comment has been mailed this 20<sup>th</sup> day of May, 2009 to:

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